No. 14,507

IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT K. BENTON,

Appellant,

vs.

UNITED TOWING CO., a corporation,

Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

Honorable Oliver D. Hamlin, Judge.

BRIEF FOR APPELLEE.

JOHN H. BLACK,
EDWARD R. KAY,
GEORGE LIEBERMANN,
APPEL, LIEBERMANN & LEONARD,
58 Sutter Street, San Francisco 4, California,
Proctors for Appellee,
United Towing Company, a Corporation.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR APPELLEE.

I. PRELIMINARY STATEMENT.

The above cause was heard before the Honorable Oliver D. Hamlin, Judge of the United States District Court, all witnesses appearing in person and having testified orally, no evidence was heard by way of deposition.

We respectfully suggest to this Honorable Court that this appeal which involves only issues of fact is merely an attempt to have the cause heard de novo by this Court.

It is not believed that this Court should or will try this case de novo. The rule appears to be well settled that the trial Court is in a better position to judge the credibility and to give weight to the evidence when all the evidence is adduced from witnesses personally present.

Although it has been stated many times that an appeal in admiralty is a trial de novo, the well-established rule has long been recognized that upon such an appeal the findings of the District Court as to the facts will be accepted by the Appellate Court unless clearly against the preponderance of the evidence. *Koehler v. United States,* 7th Circuit 187 F. 2d 933; *Leathem Smith-Putnam Navigation Company v. Osby,* 7th Cir., 79 F. 2d 280; *Drain v. Shipowners and Merchants Tow Boat Company, Ltd., et al.,* 9th Cir., 149 F. 2d 845.

In the case of *Catalina-Arbutus,* 95 F. 2d 283, Judge Denman of this Court stated:

> "While this Admiralty Appeal is a trial de novo, the presumption in favor of the findings of the District Court is at its strongest, since the trial judge heard all the witnesses save one and his deposition clearly sustains those heard."

To the same effect is the case of the *City of New York v. National Bulk Carriers, Inc.,* 138 F. 2d 826 wherein it was said:

> "It appears to be impossible to convince the Bar that we will disturb findings of fact as seldom in admiralty causes as in any other. Whether there lingers a notion—never in fact justified—

> that because an appeal in the Admiralty is a new trial, the scope of our review is broader, we cannot know; but over and over again appeals are taken without the least chance of success except by oversetting findings of fact upon disputed evidence. In order to meet this persistence, we may in the end find ourselves forced to invoke the penalty provided in Rule 28 (2) of this Court."

The facts in relation to every material issue in the matter at bar were decided by the District Court in favor of appellee and against appellant.

Appellant would have this Court, as he unsuccessfully urged the Court below, resort to speculation to sustain his claim of negligence and unseaworthiness. On the record before this Court, a finding of negligence or unseaworthiness would be speculation run riot. As was stated in *Moore v. Chesapeake & Ohio Railway Co.,* 340 U.S. 573, 71 Supreme Court 428, "speculation cannot supply the place of proof."

II. THE ISSUES AS TO UNSEAWORTHINESS.

These were:

(1) the location of the winch created unreasonable and unnecessary dangers to the operator.

(2) There was no spring on the winch to secure the dog when it was disengaged from the gear, creating unreasonable, unnecessary dangers to the operator.

(3) The brake on the winch was exposed to the weather and failed when damp, creating unreasonable and unnecessary dangers to the operator.

III. THE ISSUE AS TO NEGLIGENCE.

Appellant contends that appellee's alleged knowledge of unseaworthiness constituted negligence and that appellee was further negligent in that it had not properly instructed appellant in the operation of the winch in question.

The above contentions are clearly against the preponderance of the evidence and it is respectfully urged that the trial judge's findings must stand.

IV. THE EVIDENCE.

At the time of the accident, appellant, an employee of the United Towing Company, was discharging a barge of oil from United Towing Company barge No. 3 (TR 14). While lowering the cargo hose by use of the winch in question, he was hit in the face by what he assumed to be the winch handle though it was not clear in his mind just what happened at the time he was injured (TR 16, 21, 97, 98). Immediately prior to his accident, he was standing with one foot on the deck of the barge and the other on a pipe which runs in a fore and aft direction (TR 14, 15). At the time of his injury, libellant's height was 6′ 3″. The winch involved in this controversy is permanently fastened to the boom and is used for raising and lowering the hose (TR 382). The height of this winch above the deck is less than 5 feet and the handle of this winch in its topmost position is approximately 5½ feet from the deck (TR 384, 385). This type of winch is in common use in this locality (TR 386). When lowering the hose, the handle is removed (TR 389).

Witness Dixon, who replaced libellant following his injury, operated the winch alleged to have caused libellant's injury within hours of that incident. Defendant's Exhibit E in evidence depicts witness Dixon at this winch with the brake lever in his right hand and the crank handle in his left hand. At the time this picture was taken, Dixon was about 5′ 10½″ in height (TR 430, 431).

Dixon did not see any difference in the operation of the winch following libellant's accident from any other time he had operated it (TR 429). This same witness had never had any difficulty with the operation of winches while working for United Towing Company. He had been working on barge No. 3 for several years prior to libellant's accident (TR 432). Libellant, who at the time of his injury, was 6′ 3″ in height complained that the winch was too high for his particular use (TR 32). Libellant testified that, when operating the winch, you stand with the feet on the deck (TR 249). There is not one scintilla of evidence in the entire record before this Court that the boom to which the winch in question was fastened moved at the time the accident occurred.

It is readily apparent that the location of the winch in question had no causal connection whatever with libellant's injury. Libellant's witness Cross, who had worked on the barge in question for approximately three years prior to libellant's accident, testified that he was 5′ 2″ in height and admitted having made the statement that at no time did he have any difficulty in operating the cargo hose winch on barge No. 3 (TR 356, 362, 366). Though libellant urged that the winch

was too high for his particular use, the physical evidence and the testimony are entirely to the contrary. Witnesses, Dixon and Cross, men of somewhat smaller stature than libellant, were able to operate the winch in question without any difficulty. The lack of evidence that the positioning of the winch was in a dangerous and unsafe position cannot be supplied by argument of counsel.

Let us now consider libellant's contention that the absence of the spring on the dog was the proximate cause of his accident. This dog, which is marked B3 on libellant's Exhibit 7 in evidence, when in place grasps the gear of the winch and prevents it from moving downward. To raise its load, the winch is wound up and in this process, the dog slips over each individual gear and clamps onto an individual gear when the winding process is stopped. To lower the weight attached to the winch cable, the weight is taken off the dog by a slight winding movement of the winch handle, the brake is used to control the load and the dog is then lifted up. With the load under the control of the brake, the winch handle is removed and the load is lowered away with the brake (TR 389). Whether there was a spring attached to this dog or not, it would still be necessary to manually lift the dog from the gear to disengage it. The only purpose of the spring is to hold the dog back away from the gears which is the exact function performed by the mechanism which was attached to the dog B3 at the time of the accident in question.

Witness George who was called as one of appellant's witnesses testified that the proper way to operate this

winch when lowering the hose is to take the handle up and use the brake to lower the boom (TR 132, 133). This same witness further testified that the Appellee Company recommended that, when using the winch to lower the hose, the winch handle should be removed and the load lowered by using the brake (TR 273). Although appellant knew the handle was removable, he never in his experience on Barge No. 3 removed the winch handle (TR 290, 291). In contrast to the proper method of operating this winch, appellant would first release the tension with the winch handle, then release the dog and then lower the load away by the use of the winch handle rather than the brake (TR 16, 17, 19, 20).

Appellant argues that the winch in question was so precariously placed above a maze of pipes that he was unable to get his proper footing to operate the winch. Let us examine the evidence produced by libellant to support this contention. Witness George, who had worked on Barge No. 3, prior to appellant's accident and was familiar with the winch in question (TR 113, 114) testified that it was always possible to stand with both feet on the deck when operating the winch in question (TR 281). He further stated that the only way one should operate such winch is with both feet on the deck (TR 281) and further that one could always operate the winch in question with both feet on the deck (TR 281, 283).

Another contention urged by appellant where the absence of proof is sought to be supplied by argument is that involving the brake. He complains that the

brake slipped when it was wet or damp. Appellant, himself, disposes of this contention and prohibits even the use of speculation that the brake on the winch was even remotely connected with his accident. On the occasion on which he was injured, he did not use the brake on the winch (TR 23). As far as his accident was concerned, the brake was not involved and he was not using it at the time of his injury (TR 326).

Appellant next urges upon this Court that he was not instructed in the operation of the winch. He had been in the employ of Appellee Company for approximately 20 months before his accident (TR 42) performing the same functions as he was performing on the day he was injured. He had been working on Barge No. 3 where he was injured for three weeks before the accident (TR 24). He had worked on several other barges during his employment with this company (TR 42), all of which barges had hand-operated winches used to lower and raise the fuel discharge hoses (TR 43). He had used this same winch previously in the same operation (TR 27). He admits having received training in the operation of the piping and the operation of the valving in the barge (TR 319). Further, he had received training as to the loading, trimming and valving of the barge and in connection with the loading, admits that it was necessary to use the winches to raise and lower the hoses (TR 320). During this training period, he was present when the winches were operated and assisted during such operation (TR 322). During his first 2½ months of employment with the company, which was his ap-

prentice stage, he worked with several of the other men on the barges (TR 322, 323, 324). He knew the winch handle could be removed (TR 325). In his duties as a tanker man, every 15 or 20 minutes or half-hour, according to how fast the barge pumped, it was necessary to lower the cargo hose to get it into horizontal position with the barge (TR 16). Upon his return to work on Barge No. 3, following his injury, he used the same winch without event (TR 107, 313). He continued to work on the same barge, operating the winch, along with his other duties, for two weeks until he was discharged for being intoxicated while on duty (TR 287). In the interim period, there had been no repairs made to the winch in question (TR 288A). Following his return to work, he continued to improperly use this winch in the lowering operations by not taking advantage of the brake (TR 289). Is it not an anomalous situation where it is admitted that a man was trained, and quite extensively, in all operations which he would be required to undertake in the performance of his duties with the singular exception of one of his most important functions, a function he was required to perform every fifteen or twenty minutes or half-hour. Appellee respectfully suggests that the Honorable Trial Court was in a superior position to adjudge the credibility of this witness and the weight to be given his testimony.

Here is a flagrant example of a complete disregard for one's own personal safety by careless and slipshod manner of performing one's duty. Though appellant could and should have safely placed both feet firmly

on the deck before engaging in this operation he chose to stand with one foot on the deck and another, haphazardly, placed on a pipe. And, though this 6′ 3″—225 lb. man complained of the position of the winch, the evidence shows that a co-worker standing only 5′ 2″ in height, and another standing some 5′ 10″ in height, were able to operate this winch without difficulty. After he placed himself in this precarious position, appellant proceeded to misuse a safe and adequate appliance. He totally ignored the brake, as he had in the past and would do in the future. The brake was designed to prevent the thing that appellant claims happened in this instance. He chose to lower away his load by the use of the winch handle rather than remove it and utilize the brake. As libellant claims he must have been hit by the revolving winch handle, a fortiori, there could have been no injury if libellant would have followed the proper procedure of removing such winch handle and using the brake. In one breath, he claims the brake was defective and in the other, proclaims that he always followed this mode of operation, both before and after his injury, and emphatically denied, in many instances throughout the transcript, that the brake had anything whatsoever to do with his accident. Appellant's claim of unseaworthiness, that the winch in question was located on a movable boom, is not supported by one scintilla of evidence that this boom moved to bring about this accident.

There is only one plausible explanation of libellant's injury and this explanation came from the lips of ap-

pellant himself shortly after his accident and while all the facts were still fresh in his mind. In answer to an inquiry of Mr. Dyer, General Manager of the United Towing Company, appellee herein, as to the cause of appellant's injury, appellant stated: "It was just my own damned fault." (TR 377). Again on the same afternoon and before he was taken home, appellant declared to Mr. Rettig, the Port Engineer for Libellee Company, that the winch was in perfect working order, there was nothing wrong with it but that "I was negligent; it was my own damned fault." (TR 403).

V. ARGUMENT.

Libellant could not and does not attempt to rely on res ipsa loquitur to prove the alleged negligence and unseaworthiness. *Asprodites v. Standard Fruit and Steamship Co.,* 5 Cir., 108 F. 2d 728, *Rosenquist v. Isthmian S.S. Co.,* 2 Cir., 205 F. 2d 486.

As was said in *The Aden Maru,* 51 F. 2d 599, 601:

> "This accident occurred solely and entirely as the proximate result of the generally reckless manner in which a dangerous piece of work was being performed by attempting to drag the bail up across the beam knowing that it was bound to foul it unless someone pushed it off, instead of topping the boom for a complete clearance."

Plaintiff relies on a correct principle enumerated in *Petterson v. Alaska S. S. Company,* 205 F. 2d 478. There, while a stevedore was loading a ship, a block which he was putting to a proper use in a proper

manner . . . broke, causing the injuries complained of. It was held proper in such case for the trier of the fact to infer that the block was unseaworthy because (P. 479):

> "If the block was being put to a proper use in a proper manner, as found by the District Judge, it is a logical inference that it would not have broken unless it was defective—that is, unless it was unseaworthy."

There is no evidence that it is proper to operate the winch here in question by ignoring the brake and lowering the load by use of the winch handle. On the contrary, this is obviously a negligent abuse of the ship and its appliances (*The Aden Maru* Supra 51 F. 2d 599, 601; *Graham v. Navarchos Koundouriotis,* 1952 A.M.C. 368, 373). Nor is there any evidence to sustain the proposition that if the dog in question had a spring on it rather than the mechanism which was attached to it at the time of the accident that such condition would have prevented the accident. If it is proper to handle the ship's appliances in the manner shown here, libellant should have submitted evidence to that effect. We believe the Court can take judicial notice that this is improper.

Having alleged that unseaworthiness of the winch and the negligence of libellee caused the accident, libellant had the burden of proof. (*Grillo v. United States,* 177 F. 2d 904, 905; *Romano v. United States,* 90 Fed. Sup. 15, 17). He could not sustain this burden by speculation. "Speculation cannot take the place of proof." (*Moore v. Chesapeake & Ohio Railway Com-*

pany, 340 U.S. 573, 578; *Galloway v. United States,* 319 U.S. 372, 395-396; *De Zon v. American President Lines,* 318 U.S. 660; *Patton v. Texas and Pacific Railway Company,* 179 U.S. 658; *Buford v. Cleveland & Buffalo Steamship Company,* 192 F. 2d 196; *Callan v. Cope,* 165 F. 2d 702, 703; *Reese v. Smith,* 9 Cal. 2d 324, 328).

Though the Supreme Court has held that seamen are wards of the admiralty, and the policy is to afford to them the fullest protection, that does not mean, however, that a seaman will get judgment where there is no liability at all. (*Drain v. Shipowners and Merchants Towboat Company,* 149 F. 2d 845). The protection which the law affords seamen has not been extended to allow recovery for injury caused by misuse of the ship's appliances. As said in *Burkholder v. United States,* 60 Fed. Sup. 700, 702:

> "If recovery were to be sustained there would be no reason why it would not be also allowed in a case of misuse or negligent use of sound equipment—exactly the situation in which recovery was denied in the Osceola, 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760."

In *Lake v. Standard Fruit and Steamship Company,* 186 F. 2d 354 affirming a judgment of non-suit, the Court stated:

> "It is, of course, settled that damages may be recovered under the Jones Act only for negligence . . . and while we recognize that in passing the Jones Act, Congress did not mean that the standard of legal duty must be the same by land and sea . . . and that in general the employer's duty

> will be broadly construed under it . . . we still do not feel that it is legally incumbent upon the employer to provide an accident proof ship."

In *Ruberry v. United States,* 93 Fed. Sup. 683 where the libellant tried his case on the theory that the respondent was negligent in failing to supply adequate and proper tools for the work ordered to be done, and that he had complained to his superiors prior to the accident that the method employed was dangerous and unsafe, the Court stated:

> "Respondent's duty was not to supply the best tools, but only tools which were reasonably safe and suitable. Jacob v. City of New York, 315 U.S. 752, 758; The Cricket, 9th Circuit 71 F. 2d 61; The Tawmie, 5th Circuit 80 F. 2d 792. The fact that better tool and a better method might have been employed in the task cannot aid the libellant in the absence of a showing that the tool or method actually used was unsafe or unsuitable. . . . There was no evidence that the method used aboard SS Klamath Falls was unsafe or improper and the Court is not in a position to take judicial notice that in maritime circles removing such angle irons by means of a chain fall is unsafe or improper. Proctor for the libellant argues strongly and with much force that such is the case but it goes without saying that argument is never a substitute for evidence."

In *The Tawmie,* 80 F. 2d 792, a libel by seaman for injuries to finger sustained when metal cap covering end of barrel of spray gun came off and seaman cut finger on sharp edge of barrel, the cap of which was

crimped in instead of being held by set screw as in other types of pumps which were on the market, the Court said:

> "It is sufficient if the equipment be that which is reasonably fit and safe for its purpose and reasonably adequate to the place and occasion where used by the direction of the owners. Though a superior type may exist, it appears from the evidence, that the type furnished was reasonably safe and adequate when properly operated . . . This intervening and efficient act of libellant, which the facts and evidence do not condone, was not a contributing cause, it was the sole proximate cause of his injury. Libellant's injury being due, not to any defect in the gun, but solely to his own improper and inattentive use of it, the vessel is not liable for indemnity."

In accord is *The Daisy,* 282 Fed. 172:

> "For a misuse of a proper winch in loading lumber on a vessel causing injury to a seaman the ship is not liable."

And in *The Cricket,* 71 F. 2d 61:

> "While it is the duty of the owner to use due diligence to see that the ship and its appliances are seaworthy, he is not necessarily an insurer of safety, nor is the owner bound to furnish the best, safest and most convenient structures."

And in *The Chico,* 140 Fed. 568:

> "An appliance is reasonably fit when it can be used by the servant in the course of his employment without danger to himself by exercising ordinary care."

Seaworthiness has been defined as the sufficiency of a boat or vessel in materials, construction, function, equipment, officers, crew and outfit for the trade or service in which it is being employed. *McLeod v. Union Barge Line Company,* 95 Fed. Sup. 366, affirmed 3d Cir. 189 F. 2d 610. Seaworthiness or unseaworthiness of a boat and its appurtenant appliances and equipment is a question of fact. Here the specific question of fact for determination by the trial court was whether the winch being operated by the libellant at the time of his injury was faulty and inadequate or reasonably sufficient for the purpose for which it was intended to be used. The trial court found that the winch in question was reasonably sufficient for the purpose for which it was intended to be used.

The law does not require the shipowner to supply the best or perfect equipment and appliances but only those that are reasonably safe and suitable. *Doucette v. Vincent,* 1st Circuit, 194 F. 2d 834; *The Cricket,* 9th Circuit, 71 F. 2d 61; *Ruberry v. United States,* 93 Fed. Sup. 683. The burden of proving unseaworthiness and that such unseaworthiness, if any, was the proximate cause of his injury is upon libellant. *Grillo v. United States,* 2nd Circuit 177 F. 2d 904.

VI. CONCLUSION.

An appeal in Admiralty is a trial de novo; however the qualification of that general rule is just as widely recognized, and that is, that the findings of the District Court will be accepted by the Appellate Court

unless clearly against the preponderance of the evidence. Appellee respectfully urges that the findings of the trial court are clearly sustained by the evidence and the trial court having heard all witnesses testify in person before it and having resolved all material allegations in favor of the appellees and against the appellant, the decree should, for the reasons previously stated, be affirmed.

Dated, San Francisco, California,
November 22, 1954.

JOHN H. BLACK,
EDWARD R. KAY,
GEORGE LIEBERMANN,
APPEL, LIEBERMANN & LEONARD,
Proctors for Appellee
United Towing Company,
A Corporation.